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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 207

ANTON and IRENE SEDIVY, et al.,
Petitioners,

vs.

SUPERIOR HOME BUILDERS, INC., PARK VIEW HOME BUILDERS, INC., THE TRUST COMPANY OF CHICAGO and SAM NAPSKY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the District Court for the Northern District of Illinois, Eastern Division, was not published but is set forth in the record (R. 26, 27). The opinion of the Court of Appeals for the Seventh Circuit (R. 47-54) is reported at 188 F. 2d 729.

JURISDICTION.

It is suggested that the Court refuse to assume jurisdiction for the reasons that the decision of the Courts below are correct, that they are not in conflict with any other decisions and there are no important questions of federal law.

QUESTIONS PRESENTED.

1. Whether the statutory right and remedy of private persons to restitution, created by Section 7 (d) of the Veterans Emergency Housing Act of 1946, may be maintained after repeal and termination of this statute, without being subject to the one year limitation period contained in Section 7 (d).

2. Whether the statutory right of restitution under Section 7 (d) of the Veterans Emergency Housing Act of 1946 and Priority Regulation 33 can be maintained on sales occurring:

a. Between the period of June 30, 1947 and December 31, 1947, the period after the repeal of the Veterans Emergency Housing Act but prior to the termination date set forth in the repealed statute.

b. After December 31, 1947, the date of termination expressed in Section 1 (b) of the Veterans Emergency Housing Act of 1946.

STATUTES AND REGULATIONS INVOLVED.

The petitioners omitted Section 7 (d) of the Veterans Emergency Housing Act of 1946 from their petition. This is a most important section since the petitioners' claims are predicated solely upon this section. The omission may be explained by the fact that the government in the *Fortier* case* also omitted this section. In the *Fortier*

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* Petitioners have employed the novel method of adopting the reasons of the petitioner in the case of **United States of America, Petitioner v. Robert Fortier, et al.**, 71 S. Ct. 796 in lieu of presenting their own reasons and argument to support their particular state of facts.

case the one year limitation period was not in issue. Section 7 (d) reads as follows:

> "If any person selling housing accommodations violates a regulation or order prescribing a maximum selling price, the person who buys such housing accommodations may, within one year from the date of the occurrence of the violation, bring an action for the amount by which the consideration exceeded the maximum selling price, plus reasonable attorney's fees and costs as determined by the court." (60 Stat. 207, 50 U.S.C. App. #1827)

Further, there was omitted from the petition in the instant case and also in the government's petition in the *Fortier* case Section 4 (a) (5) of the Housing and Rent Act of 1947 (61 Stat. 193, 50 U.S.C. App. (Supp. 1) #1884) which provides as follows:

> "the Housing Expediter shall prescribe by regulations: (i) the manner in which such housing accommodations shall be publicly offered in good faith for sale or rental to veterans of World War II or their families in accordance with the provisions of this section, and (ii) exceptions to this section for hardship cases, including appropriate exceptions from the operation of paragraphs (3) and (4): Provided, That nothing contained in this Act shall affect or remove any veteran's preference requirements heretofore established under Public Law 388, Seventy-ninth Congress, and outstanding with respect to housing accommodations completed prior to the date of the enactment of this title."

ADDITIONAL STATEMENT.

Petitioners' brief statement coupled with their unusual method of wholly relying upon the statements and reasons of the government in the case of *United States of America, Petitioner* v. *Fortier,* 71 S. Ct. 796 compels the respondent to present the record more fully to this Court.

The petitioners, thirty-seven private individuals, alleged violations of the Veterans Emergency Housing Act of 1946 (R. 4-8, 10-13) and sought relief only by way of mandatory injunction to compel restitution and reasonable attorneys' fees (R. 8, 13).

The first of petitioners' two actions contained twenty-one claims and was commenced by the filing of a complaint on March 23, 1950 (R. 2). The sales complained of took place during the period between September 4, 1946 and January 7, 1949 (R. 4-8), all more than one year prior to the filing of the complaint.

The second complaint contained sixteen claims and was filed on May 1, 1950 (R. 8). The sales took place during the period between June 27, 1947 and March 29, 1949 (R. 10-13), also all more than one year prior to the filing of the complaint.

Section 1 (b) of the Veterans' Emergency Housing Act of 1946 provided for the termination of the entire act on December 31, 1947. However, prior to its termination date the statute was repealed on June 30, 1947 by the Housing and Rent Act of 1947.

The sales can be categorized with relation to the Veterans Emergency Housing Act of 1946 as follows:

1. Six sales occurred before June 30, 1947, the date of repeal of the Veterans Emergency Housing Act of 1946 by the Housing and Rent Act of 1947.

2. Nine sales occurred between June 30, 1947 and December 31, 1947, the latter date being the termination date set forth in Section 1 (b) of the Veterans Emergency Housing Act, had it not been repealed prior thereto.

3. Twenty-two sales occurred after December 31, 1947, the original date for termination as expressed in the Veterans Emergency Housing Act.

An analysis of the complaints reveal the following:

1. No dates are alleged as to when the priorities assistance was granted to the respondents (R. 3, 9).

2. No allegations are made as to whether the houses sold after June 30, 1947 were in construction or completed prior to June 30, 1947.

REASONS FOR NOT GRANTING THE WRIT.

I.

The Questions Presented in the Instant Petition Are Not Involved in the Government's Petition in the Fortier Case.

The petitioners in the instant case pose two questions and then state (p. 2): "The fundamental questions presented herein are also presented by" the government in the *Fortier* case. The petitioners rely upon the same reasons as those advanced by the government in the *Fortier* case and "adopt as their own" the government's statements made in that case.

This Court will immediately discern that the petitioners' statement as to the fundamental questions being the same in both cases is incorrect. For that reason no reliance can be placed on the petition in the *Fortier* case in the determination of the instant case. To illustrate:

1. The government in the *Fortier* case explicitly limited its question to sales occurring between June 30, 1947 and December 31, 1947. The petitioners, however, framed their question number 1, quoting the question *verbatim* from the *Fortier* petition except for the insertion of the words "or modified" and the substitution of the words "after this date" in lieu of "December 1947". By this substitution petitioners attempt to include the twenty-

two sales which occurred after December 31, 1947, the date upon which the Veterans Emergency Housing Act of 1946 would have expired, if not for its earlier repeal.

2. The second question posed by the petitioners which referred to Section 7 (d) of the Veterans Emergency Housing Act is not presented, discussed, mentioned nor even faintly referred to in the government's petition in the *Fortier* case.

3. In the *Fortier* case the government based its claim upon Section 7 (a) of the Veterans Emergency Housing Act which contained no limitation period within which to bring suit. It also provides for injunctive relief. Section 7 (a) has no application to suits by private individuals. In the instant case the petitioners, as private individuals, are compelled to rely solely upon Section 7 (d) of the Act which requires bringing suit within one year from the date of sale and does not provide for any injunctive relief.

4. In the *Fortier* case the petition (p. 5) states the date when the priorities assistance was granted. Furthermore, the government's petition, by the phrasing of its question, is concerned only with houses in construction prior to June 30, 1947 (p. 2). In the instant case the petitioners did not allege any of the following important dates: (1) the granting of priorities assistance; (2) commencement of construction; or (3) the completion of construction.

5. In the *Fortier* petition the government on page 7 of its petition emphasizes the fact that there are a great many suits pending on the issue therein presented which involve veterans. In the instant case there are no allegations whatsoever by the petitioners that they are veterans.

From the foregoing it is apparent that the reasons ad-

vanced by the government in the *Fortier* case cannot apply to the instant case. The petitioners' failure to state within the covers of their petition the reasons relied upon for the allowance of the writ is alone sufficient reason for this Court to deny the granting of the writ (Supreme Court Rule 38). The violation of this rule is especially flagrant when the facts and questions of law are so dissimilar as in the instant and *Fortier* cases.

II.

The Decisions of the Court of Appeals and the District Court Are Correct Based Solely Upon the Failure to Institute Suit Within One Year from the Date of Sales.

The District Court dismissed petitioners' complaints on the ground that the actions were not brought within one year from the date of sales (R. 27). The Court of Appeals affirmed the judgment for dismissal basing its decision in part on the one year limitation and in part on the ground that some of the claims were based on sales made after the repeal and termination of the Veterans Emergency Housing Act of 1946.

Assuming that the government's position in the *Fortier* case is correct in that sales made after June 30, 1947 but prior to December 31, 1947 are subject to the provisions of the Veterans Emergency Housing Act the petitioners are immediately confronted with the barrier of the one year limitation period within which to bring suit. This applies to all of their thirty-seven claims.

The petitioners are *not assisted* by government's petition in the *Fortier* case because that question is not presented there. The petitioners fail to cite a single authority or advance a single argument that the one year limitation should not apply to their claims.

Petitioners, however, questioned the application of the one year limitation period by merely posing the question. (p. 2 of petition—Question 2). This question was adequately answered by the Court of Appeals as follows:

> "It is true, as plaintiffs state, that the 1947 Act contains no limitation period, but that fact militates against plaintiffs' contention. Certainly there was no occasion to fix a limitation period on the exercise of a right which had been repealed. Plaintiffs' contention leads to the incongruous result that if the 1946 Act was still in effect, the limitation period which it contained would constitute a barrier to the instant suits but that such suits may be maintained under the 1947 Act because the latter contains no limitation period. Evidently Congress by the 1947 Act intended to restrict rather than expand the rights conferred by the 1946 Act." (R. 51)

The petitioners' rights, if any, were created by Section 7 (d) of the Veterans Emergency Housing Act. To this right there was attached the condition of a one year period within which to enforce it. The right accrued as of the date of sale which the petitioners have conceded in the Court of Appeals (R. 50).

The Supreme Court of the United States enunciated the above principle in the case of *The Harrisburg*, 1886, 119 U.S. 199, 214, where it was stated at page 214:

> "The statutes created a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within 12 months and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, **and not of the remedy alone.** It is a condition attached to the right to sue at all."

This principle was reaffirmed in the case of *Midstate Horticultural Co., Inc.* v. *Pennsylvania Railroad Company,*

1943, 320 U.S. 356, 364 wherein this court stated at p. 364 as follows:

> "The purport of decisions is that Congress intended, where the period has run, to put an end to the substantive claim and the corresponding liability. The cause of action, the very foundation for relief, is extinguished."

In *Adams* v. *Albany,* D.C., S.D. Cal., N.D. 80 F. Supp. 876, 880 the court construing Section 7 (d) of the Veterans Emergency Housing Act stated as follows:

> "But there is a more serious infirmity to the Complaint. We are dealing with a statute which creates liability. And a limitation in such statute *affects the right*".

In fact, the District Court in that case considered the expiration of the one year period as a jurisdictional infirmity and so stated at page 880:

> "And there is no jurisdiction to entertain the action after the expiration of the period within which it might have been brought. This, because we are dealing *with a statute of creation and not with a statute of limitation*".

In *Amos* v. *Carson,* 1948, 186 Tenn. 393, 398, 210 S.W. 677, 679, the Supreme Court of Tennessee refused recovery under the Veterans Emergency Housing Act because of the one year limitation period and at page 393 stated:

> "The statute was in force when the appellant purchased this property on October 5, 1946. The right of action thereunder dated from this date. Suit was filed herein on October 16, 1947 or more than one year after the cause of action accrued. This statute authorized a civil suit by buyers against sellers who violated maximum sale prices. It is the only statute or regulation we know of wherein such a suit is authorized.

> This statute which prescribes a right of action also prescribes a time within which this right may be exercised. That is, the buyer 'may within one year from the date of the occurrence of the violation bring an action * * *'. To say that the right 'may' be exercised within the prescribed time is to preclude the idea that it may be exercised at some later time".

Moreover, the government on pages 10 and 11 of its petition in the *Fortier* case stated that the interpretation of the Housing Expediter as the official charged with the administration of the housing program was entitled to great weight, citing *United States* v. *American Trucking Associations*, 310 U.S. 534. The Housing Expediter is also the official charged with the administration of the Veterans Emergency Housing Act.

The general counsel for the Housing Expediter and his chief legal officer stated that it is the opinion of the Office of Housing Expediter that the one year statute of limitations as contained in Section 7 (d) of the Veterans Emergency Housing Act would apply to suits by individuals for restitution of overcharges and is not affected by Section 1 (a) of the Housing and Rent Act of 1947.* If the government's petition in the *Fortier* case is to be given any consideration at all, it should be considered as adding great weight to the opinion of the General Counsel for the Office of Housing Expediter.

In addition, none of the cases cited by the government in the *Fortier* case are in conflict with the position of the respondents in the instant case with regard to the one year limitation period within which to sue; nor are there any other conflicting reported decisions. In fact, one of the

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* Letter from Ed Dupree, General Counsel, Office of Housing Expediter dated June 2, 1950, which is set forth in Appendix infra pp. 2a and 3a.

cases cited by the government in the *Fortier* case, *Rheinberger* v. *Reiling*, D.C. Minn. 89 F. Supp. 598, explicitly based its decision upon the premise that suit was brought within the one year period.

III.

Under the Facts in the Instant Case the Petitioners Are Not Entitled to Restitution for Sales Occurring Between June 30, 1947 and December 31, 1947 for the Reason that these Sales Do Not Come Within the Savings Clause of the Housing and Rent Act of 1947.

The petitioners attempted to expand the question propounded by the government in its petition in the *Fortier* case so as to include as violations of the Act twenty-two sales made after December 31, 1947. No citation of authority is necessary other than the statute and the regulation to determine that sales made after the termination of Veterans Emergency Housing Act on December 31, 1947, (without reference to its repeal on June 30, 1947,) was not subject to maximum price restrictions. Section 944.54 (g)(1) of Priorities Regulation 33, the purported basis for petitioners' claims, states that "the restrictions on sales prices and rent contained in this paragraph (g) must be observed so long as this regulation remains in effect". The regulation was revoked by the Housing Expediter on December 31, 1947 (13 F.R. 6).

As to the nine sales occurring between June 30, 1947 and December 31, 1947 there is some area of resemblance to the facts in the *Fortier* case but only as to the dates. There is an important element missing from the instant case which was present in the *Fortier* case. There is no allegation in the instant case that the nine houses were in construction on or before June 30, 1947. This omission is

important since the government makes much of this point on pages 10 and 11 of its petition. On this important difference of the facts petitioners are not entitled to a writ of certiorari based upon the *Fortier* petition.

Respondents, without desiring to be drawn into controversy with the government in the *Fortier* case, point out that the government overlooked a very important section of the Housing and Rent Act of 1947 which repealed the Veterans Emergency Housing Act of 1946. Section 4 (a) (5) of the 1947 Act provided, in substance, that nothing contained in the Housing and Rent Act of 1947 should affect or remove any veteran's preference requirements theretofore established under the Veterans Emergency Housing Act and outstanding with respect to housing accommodations completed prior to the date of the enactment of the Housing and Rent Act.

The respondents submit that at the very least, in order to be subject to the requirements of the Veterans Emergency Housing Act the houses in question must have been completed before June 30, 1947 and not merely in the process of construction, and in addition the completed houses must have been sold before December 31, 1947. In the instant case, the plaintiffs failed to allege these facts and elected to stand on their complaints in the District Court, which complaints were substantially defective.

In construing the acts in question it should be remembered that at the time of the repealing act, it was then the policy of the Congress (the 80th) to remove all price restrictions and to restrict rather than expand regulation.

CONCLUSION.

In view of the foregoing reasons, it is respectfully suggested that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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MORRIS D. SPIEGEL,
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APPENDIX.

1. Letter dated June 2, 1950 from Ed Dupree, General Counsel for Office of Housing Expediter.

COPY BOUND CLOS

OFFICE OF
THE HOUSING EXPEDITER
WASHINGTON 25, D. C.

JUN 2 1950

IN REPLY REFER TO
GC-4

Morris D. Spiegel, Esq.
10 South La Salle Street
Suite 1000
Chicago 3, Ill.

Dear Mr. Spiegel:

This is in reply to your letter of May 25, 1950 requesting copies of certain statutes and regulations of the priorities housing program and also presenting several questions based on these statutory and regulatory materials.

In response to your request, we are pleased to enclose Priorities Regulation 33, Housing Expediter Priorities Regulation 5 and the Housing Permit Regulation, together with amendments of these three Regulations. Also, there is enclosed a copy of the Veterans' Emergency Housing Act of 1946. Since we do not have available for distribution a copy of the Second War Powers Act, you are referred to the citation therefor, insofar as pertinent to the Priorities Regulations, namely, 50 U.S.C.A., Appendix Section 633.

Your first question asks whether an overceiling sale of a priorities house after the expiration of the Second War Powers Act but during the effective period of the Veterans' Emergency Housing Act is still actionable under the latter statute. If a priorities dwelling subject to a maximum sales price was completed after August 27, 1946, then the sale prior to January 1, 1948 at an overceiling price is presently actionable under the Veterans' Emergency Housing Act, except that the private action of a purchaser in such case would be subject to the defense of the one year limitation contained in Section 7(d) of the Act.

For your second question, you inquire whether the sale of a priorities assisted dwelling at a price in excess of the maximum sales price, which sale occurred during 1948, would constitute the basis of a suit by individuals under either the Second War Powers Act or the Veterans' Emergency Housing Act of 1946. The Priorities Regulations (P.R. 33 and HPR 5) with their restrictions on sales prices were revoked effective January 1, 1948. Therefore, sales in excess of maximum prices which occurred after the revocation date of these Regulations would not constitute actionable violations. However, it is also our opinion that if a contract for the sale of a priorities dwelling was entered into at an over-the-maximum-price prior to January 1, 1948, then such contract constitutes an actionable violation of the Priorities Regulations, even though the closing of the deal occurred on or after January 1, 1948.

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Finally, you asked whether the one year statute of limitations contained in the Veterans' Emergency Housing Act applies to suits by individuals despite the provisions of Section 1(a) of the Housing and Rent Act of 1947. It is our opinion that the one year statute of limitations as contained in Section 7(d) of the Veterans' Emergency Housing Act would apply to suits by individuals for restitution of overcharges and is not affected by Section 1(a) of the 1947 Act.

I trust that the above materials and information will be of assistance in the solution of your problem.

Sincerely yours,

ED DUPREE
General Counsel

Enclosures

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